Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF NEBRASKA, ex rel. DON STENBERG,
Attorney General of the State of Nebraska,

Petitioner,

CITY OF GRAND ISLAND,

Plaintiff,

v.

UNITED STATES OF AMERICA; ENVIRONMENTAL PROTECTION AGENCY; CAROL M. BROWNER,
Administrator of the United States
Environmental Protection Agency,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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24pp

QUESTION PRESENTED FOR REVIEW

I. Whether Congress has prohibited a state from challenging the constitutionality of the Safe Drinking Water Act in United States District Court?

LIST OF PARTIES

The Petitioner is the State of Nebraska, ex rel., Don Stenberg, Attorney General for the State of Nebraska. The Respondents are the United States of America, the United States Environmental Protection Agency and Carol M. Browner, Administrator of the United States Environmental Protection Agency.

An additional plaintiff in the United States District Court for the district of Nebraska was the City of Grand Island, Nebraska.

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JURISDICTION

On February 1, 2001, the United States Court of Appeals for the Eighth Circuit entered its opinion and judgment. The jurisdiction of this Court to review the judgment in question is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. A petition for review of –

> (1) actions pertaining to the establishment of national primary drinking water regulations (including maximum contaminant level goals) may be filed only in the United States Court of Appeals for the District of Columbia circuit; and
>
> (2) any other action of the Administrator under this chapter may be filed in the circuit in which the petitioner resides or transacts business which is directly affected by the action.

Any such petition shall be filed within the 45-day period beginning on the date of the promulgation of the regulation or any other final Agency action with respect

to which review is sought or on the date of the determination with respect to which review is sought. . . .

42 U.S.C. § 300j-7 (2000 Supp.).

2. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make.

U.S. Const., Art. III, Sec. 2, cl. 2.

3. (b) The Supreme Court shall have original but not exclusive jurisdiction of:

> (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;
>
> (2) All controversies between the United States and a State;
>
> (3) All actions or proceedings by a State against the citizens of another State or against aliens.

28 U.S.C. § 1251(b) (1993).

4. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331 (1993).

STATEMENT OF THE CASE

In 1974, Congress enacted the Safe Drinking Water Act at 42 U.S.C. § 300f-300j (2000). With a few minor exceptions, every public water system in each state must comply with the provisions of the Act or risk an enforcement action and civil penalties. The State of Nebraska owns and operates various public water systems including a system which provides water for the Lincoln Regional Center, a state institution under the supervision of the Nebraska Department of Health and Human Services and located in Lincoln, Nebraska. This public water system involves only ground water, is located wholly within state boundaries and does not involve any aspect of interstate commerce.

On September 14, 1999, the State of Nebraska (hereinafter Nebraska) and the City of Grand Island, Nebraska (hereinafter Grand Island), which also owns and operates a public water system, filed suit in district court against the respondents seeking a declaration that the Safe Drinking Water Act is unconstitutional as applied to certain local water supply systems owned by Nebraska and Grand Island. Nebraska and Grand Island alleged that the Act exceeds the authority of Congress as it purports to govern local public water systems located wholly within state boundaries which do not involve any aspect of interstate commerce, infringes upon the non-delegation doctrine as Congress has improperly delegated its legislative authority to the Environmental Protection Agency, and provides insufficient legislative standards for the guidance of the Environmental Protection Agency in designating the contaminants subject to regulation. Nebraska and Grand Island then requested a declaratory

judgment pursuant to 28 U.S.C. § 2201, finding and determining that the provisions of the Safe Drinking Water Act as applied are unconstitutional.

The Respondents, United States of America, Environmental Protection Agency and Carol M. Browner, Administrator, filed a Motion to Dismiss asserting, among other grounds, that subject matter jurisdiction was lacking because exclusive jurisdiction is vested in the United States Court of Appeals for the District of Columbia Circuit or other circuits. On April 4, 2000, the United States District Court for the District of Nebraska, Judge Kopf presiding, granted Respondents' Motion to Dismiss on the basis of 42 U.S.C. § 300j-7 (2000 Supp.), finding that exclusive jurisdiction was vested in the United States Court of Appeals.

The Complaint contained absolutely no allegations with regard to agency regulations or final agency action. Rather, the district court was asked to review the actions and authority of Congress itself in enacting the Safe Drinking Water Act and to find that the Act itself is unconstitutional and unenforceable. Notwithstanding the language of the Complaint and Nebraska's position that the district court had jurisdiction over the matter pursuant to 28 U.S.C. § 1331, the district court dismissed the Complaint for lack of subject matter jurisdiction, stating that Nebraska could not challenge only the constitutionality of the statutory scheme. (App. 10).

An appeal was taken to the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. § 1291, and on February 1,

2001, that Court affirmed the judgment of the district court. (App. 1-7).

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari in this case to resolve an important question of federal law that has not been, but should be, settled by this Court. The ability of a state to access the federal courts to resolve a dispute with the government of the United States over an issue of federal constitutional law is one of the most important issues that can be placed before the Supreme Court of the United States.

In fact, Art. III, Section 2 of the United States Constitution provides for original jurisdiction in the United States Supreme Court for only two categories of cases: (1) "all Cases affecting Ambassadors, other public Ministers and Consuls;" and (2) "those in which a State shall be Party." It is also significant that Congress, in 28 U.S.C. § 1251, has provided for original jurisdiction in the United States Supreme Court for only very limited types of cases, one of which is "[A]ll controversies between the United States and a State . . . " 28 U.S.C. § 1251(b)(2). In this action Nebraska seeks to have the Safe Drinking Water Act declared unconstitutional because it exceeds Congress' power under the Commerce Clause and violates the non-delegation doctrine and the Tenth Amendment. However, while it is clear that Nebraska could bring its constitutional complaint against the United States as an original action, the Eighth Circuit Court of Appeals has denied Nebraska the opportunity to bring its

complaint in the United States District Court for the District of Nebraska.

In 28 U.S.C. § 1331, Congress has given all district courts original jurisdiction of all civil actions "arising under the Constitution, laws, or treaties of the United States." The ability to litigate a constitutional claim concerning an act of Congress in the United States District Court pursuant to 28 U.S.C. § 1331 should only be denied where Congress has expressly and unequivocally removed district court jurisdiction as to that specific act of Congress. That was not done here.

With regard to the Safe Drinking Water Act, Congress has removed district court jurisdiction of only two specific types of questions: (1) "actions pertaining to the establishment of primary drinking water regulations . . . " 42 U.S.C. § 300j-7(1); and (2) "any other action of the Administrator under this Chapter . . . " 42 U.S.C. § 300j-7(2). Nebraska does not raise either of these types of questions in its Complaint. Instead, Nebraska objects to Congress' actions and lack of authority in enacting this legislation so as to apply federal requirements to the Lincoln Regional Center and other local public water systems.

If the only way Nebraska can directly challenge the constitutionality of the Safe Drinking Water Act is an original action in the Supreme Court of the United States, then we are prepared to do so. However, that does not appear to us to be the intention of Congress. Congress clearly gave the United States District Court the jurisdiction to hear Nebraska's constitutional claim in 28 U.S.C. § 1331 and has not expressly and unequivocally withdrawn district court jurisdiction in 42 U.S.C. § 300j-7.

The Eighth Circuit is the only circuit court to have ruled that a district court lacks jurisdiction to consider the constitutionality of the Safe Drinking Water Act. In reaching its opinion the Eighth Circuit relied upon two decisions concerning a provision of the Clean Air Act, 42 U.S.C. § 7607(b)(1), which is substantially similar to 42 U.S.C. § 300j-7. (App. 5-7). One such decision was *Missouri v. United States*, 109 F.3d 440 (8th Cir. 1997). In Petitioner's view, the *Missouri* case may be distinguished as the State of Missouri specifically alleged that the EPA had taken final action in issuing several deficiency findings and, therefore, challenged certain actions of the EPA administrator under the Clean Air Act as well as part of the Act itself on constitutional grounds. It is the Petitioner's position that the Eighth Circuit has now gone beyond its ruling in *Missouri v. United States* in finding that § 300j-7 creates a jurisdictional bar to a district court's entertaining a constitutional challenge to a federal statute even before final agency action has occurred. Nebraska submits that § 300j-7 should not be allowed to restrict to the circuit courts a constitutional challenge of the Safe Drinking Water Act in circumstances where no final agency action has occurred.

Furthermore, we note that the Fourth Circuit has specifically held that the question which we present here is an unresolved question. The other case relied upon by the Eighth Circuit was *Virginia v. United States*, 74 F.3d 517 (4th Cir. 1996), in which the Fourth Circuit considered the jurisdictional provision of the Clean Air Act which channeled review of final EPA action exclusively to the Court of Appeals. One of Virginia's arguments was that the Court's construction of the jurisdictional provision of

the Clean Air Act forced the State to wait for hostile agency action in order to bring a constitutional challenge to the Clean Air Act. The Fourth Circuit noted that the situation described by Virginia was not presented in that case as Virginia filed suit after EPA took actions that were subject to challenge under the Clean Air Act. "We, therefore, have no occasion to consider whether, in the absence of those final actions, Virginia could have obtained review under the district court's general federal question jurisdiction." *Virginia* at 525. The set of circumstances anticipated by the Fourth Circuit in the *Virginia* case is present in this case. Nebraska challenges the constitutionality of an act of Congress, not any rule or administrative action of the EPA.

CONCLUSION

The important question of federal law that we ask this Court to resolve is whether Congress has prohibited a state from challenging the constitutionality of the Safe Drinking Water Act in United States District Court. The United States Court of Appeals for the Eighth Circuit held that despite 28 U.S.C. § 1331 the United States District Court lacked jurisdiction to consider this constitutional issue. We believe it was not the intention of Congress to restrict a challenge to the constitutionality of the Act in that manner. The Petitioner respectfully

requests the Court to grant its Petition for a Writ Of Certiorari.

Respectfully submitted,

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United States Court of Appeals,
FOR THE EIGHTH CIRCUIT

No. 00-2410

State of Nebraska, ex rel. Don Stenberg, Attorney General of the State of Nebraska, Appellant, City of Grand Island, Plaintiff, v. United States of America; Environmental Protection Agency; Carol M. Browner, Administrator of the United States Environmental Protection Agency, Appellees.	)	Appeal from the United States District Court for the District of Nebraska.

Submitted: December 15, 2000
Filed: February 1, 2001

Before LOKEN and MAGILL, Circuit Judges, and BATTEY,[1] District Judge.

---

[1] THE HONORABLE RICHARD H. BATTEY, United States District Judge for the District of South Dakota, sitting by designation.

MAGILL, Circuit Judge.

The State of Nebraska and the City of Grand Island, Nebraska (together, "Nebraska"), filed suit in district court[2] against the United States, the Environmental Protection Agency (the "EPA"), and EPA Administrator Carol M. Browner, seeking a declaration that the Safe Drinking Water Act (the "Act"), 42 U.S.C. §§ 300f-300j (2000), is unconstitutional because it exceeds Congress's powers under the Commerce Clause and violates the nondelegation doctrine and the Tenth Amendment. The district court dismissed the suit for lack of subject matter jurisdiction, holding that 42 U.S.C. § 300j-7 requires suits "pertaining to the establishment of national primary drinking water regulations" to be filed within forty-five days of issuance of the regulations in the United States Court of Appeals for the D.C. Circuit. Nebraska appeals, and we affirm.

I.

The Safe Drinking Water Act requires the EPA to adopt regulations to prevent contamination of public water systems. 42 U.S.C. § 300g-1. The EPA drafts national primary drinking water regulations that establish the procedures necessary to treat contaminants that pose an adverse effect on human health. *Id.* at § 300f(1); *see also American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1269 (D.C. Cir. 1994). At issue in this case are the EPA's regulations for lead and copper (the "Lead and Copper Rule"), which became effective in December 1992. *See* 40

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[2] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

C.F.R. § 141.80-.91 (2000). The Lead and Copper Rule establishes a treatment technique that requires public water systems to monitor the levels of lead and copper at consumers' taps. If lead and copper levels are too high, the public water system must treat the water to reduce its corrosivity, thereby minimizing the lead and copper in the water. *Id.* at § 141.81-89.

A. *Nebraska I*

In July 1998, Nebraska filed suit in district court against the United States, the EPA, and EPA Administrator Carol M. Browner, seeking a declaration that the Act and the Lead and Copper Rule violated the Commerce Clause and the Tenth Amendment. On May 19, 1999, the district court granted Appellees' motion to dismiss, holding that under § 300j-7, the United States Court of Appeals for the D.C. Circuit has exclusive jurisdiction over Nebraska's claims.

B. *Nebraska II*

In September 1999, Nebraska, now joined by the City of Grand Island, again sought a declaratory judgment, this time alleging that the Act is unconstitutional as applied to two public water facilities in Nebraska, the Lincoln Regional Center and the City of Grand Island, because it exceeds Congress's powers under the Commerce Clause and violates the non-delegation doctrine and the Tenth Amendment. On April 4, 2000, the district court granted Appellees' motion to dismiss, holding that § 300j-7 requires suits "pertaining to the establishment of national primary drinking water regulations" to be filed

within forty-five days of issuance of the regulations in the D.C. Circuit. The court stated:

> Stripping the complaint of references to the EPA's implementing regulations does not change the result. A plaintiff bringing an 'as applied' challenge contends that the statute would be unconstitutional under the circumstances in which the plaintiff has acted or proposed to act. Because the [Act] is not self-implementing, Plaintiffs' 'as-applied' challenge necessarily implicates the EPA regulations or other final agency action. Plaintiffs cannot challenge only the constitutionality of the statutory scheme. (citations omitted).

Nebraska appeals the district court's April 4 decision.

II.

The district court's ruling is reviewed de novo. *Gilbert v. Monsanto Co.*, 216 F.3d 695, 699 (8th Cir. 2000). Nebraska argues that the district court erred in holding that § 300j-7 restricts jurisdiction over this case to the United States Court of Appeals for the D.C. Circuit. Section 300j-7 provides:

> A petition for review of –
>
> (1) actions pertaining to the establishment of national primary drinking water regulations (including maximum contaminant level goals) may be filed only in the United States Court of Appeals for the District of Columbia circuit; and

> (2) any other action of the Administrator under this chapter may be filed in the circuit in which the petitioner resides or transacts business which is directly affected by the action.
>
> Any such petition shall be filed within the 45-day period beginning on the date of the promulgation of the regulation or any other final Agency action with respect to which review is sought or on the date of the determination with respect to which review is sought.

Nebraska claims that it is only attacking the Act and is not attacking a "final Agency action" under § 300j-7. Therefore, Nebraska argues, it should be able to proceed in a Nebraska federal district court under general federal question jurisdiction.

In holding that it was without jurisdiction to hear Nebraska's claim, the district court relied on *Virginia v. United States*, 74 F.3d 517 (4th Cir. 1996), and *Missouri v. United States*, 109 F.3d 440 (8th Cir. 1997). In *Virginia*, the Fourth Circuit held that the Clean Air Act precluded the district court from exercising jurisdiction over a complaint filed by Virginia that challenged the constitutionality of various provisions of the Clean Air Act. The Clean Air Act's judicial review provision provides that a petition for review of any "final action of the [EPA] Administrator . . . may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b)(1). Despite this provision, Virginia sought to proceed in district court under general federal question jurisdiction, arguing that its action was directed at the Clean Air Act itself rather than any final EPA action. *See*

Virginia, 74 F.3d at 522. The Fourth Circuit rejected Virginia's attempt to cast its complaint as being directed solely against the constitutionality of the Clean Air Act and not against the Act's implementing regulations, stating that "although [Virginia] seeks a ruling that certain parts of the [Clean Air Act] are unconstitutional, the practical objective of the complaint is to nullify final actions of [the] EPA." *Id.* at 523. Thus, the court's holding prevented Virginia from evading the Act's requirement that challenges to "final Agency action" be brought directly to a federal court of appeals.

Similarly, in *Missouri*, the state of Missouri brought suit in district court, arguing that the Clean Air Act and certain actions of the EPA Administrator interpreting the Clean Air Act were unconstitutional. 109 F.3d at 441. This Court, following the Fourth Circuit's decision in *Virginia*, rejected Missouri's reasoning that it could proceed in district court because it sought to challenge the constitutionality of the Clean Air Act and not just the actions of the EPA. *See id.* at 442. We instead ruled that Missouri's challenge to the Clean Air Act could not be completely separated from the EPA's actions, thereby preventing Missouri from evading the Clean Air Act's jurisdictional requirement that lawsuits challenging "final Agency action" be brought directly to the court of appeals. *See id.*

As in *Virginia* and *Missouri*, Nebraska's suit challenging the constitutionality of the Act is not independent of the EPA's implementing regulations. In *Nebraska I*, Nebraska challenged the Lead and Copper Rule. After the district court dismissed *Nebraska I* for lack of jurisdiction, Nebraska filed suit again, only this time omitting references to the EPA's implementing regulations and

instead casting its complaint as an "as-applied" challenge to the Act itself. However, the Act is not self-executing; rather, it is applied through EPA regulations. *See* 42 U.S.C. § 300g-1(b)(1)(A) (requiring the EPA to promulgate national public drinking water regulations). Therefore, Nebraska's challenge to the Act as applied to the public water facilities at the Lincoln Regional Center and the City of Grand Island necessarily implicates the EPA's regulations.

III.

We AFFIRM the district court's dismissal of Nebraska's suit because § 300j-7 required Nebraska to bring its suit in the United States Court of Appeals for the D.C. Circuit.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA, ex rel. Don Stenberg, Attorney General of the State of Nebraska, and CITY OF GRAND ISLAND, NEBRASKA,	4:99CV3252
Plaintiffs,	**MEMORANDUM**
vs.	**AND ORDER**
UNITED STATES OF AMERICA, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency,	(Filed April 4, 2000)
Defendants.	

This matter is before the court on Defendants' motion to dismiss (filing 15), filed pursuant to Fed. R. Civ. P. 12(b)(1). Defendants argue that subject matter jurisdiction is lacking because: (1) under provisions of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300j-7, exclusive jurisdiction is vested in the United States Court of Appeals for the District of Columbia Circuit (with respect to "actions pertaining to the establishment of national primary drinking water regulations") or other circuits (with respect to "any other final action of the [EPA] Administrator"); (2) Defendants' sovereign immunity has not been waived; (3) Plaintiffs lack standing; and (4)

Plaintiffs' claims are not ripe for review. I shall grant Defendants' motion on the basis of SDWA § 300j-7.

Plaintiffs, the State of Nebraska and the City of Grand Island, Nebraska, seek a declaratory judgment that the provisions of the SDWA, as applied to regulate the water supply systems at the Lincoln Regional Center (a State-owned facility) and within the City, are unconstitutional because they exceed the authority granted to Congress by the Commerce Clause, violate the Tenth Amendment, and improperly delegate legislative authority to the Environmental Protection Agency. Plaintiffs purport to challenge only the Act itself, and not any EPA regulations or actions.

In a related case that was filed in this court on July 6, 1998, *State ex rel. Stenberg v. United States Environmental Protection Agency, et al.*, Case No. 4:98CV3226, the State sought a declaratory judgment that the SDWA, and the regulations that were promulgated by the EPA to implement the Act, violated the Commerce Clause and Tenth Amendment. That action was ordered dismissed for lack of jurisdiction on May 19, 1999.

Stripping the complaint of references to the EPA's implementing regulations does not change the result. A plaintiff bringing an "as-applied" challenge contends that the statute would be unconstitutional under the circumstances in which the plaintiff has acted or proposed to act. *See Olmer v. City of Lincoln*, 23 F.Supp.2d 1091, 1104 (D.Neb. 1998), *aff'd*, 192 F.3d 1176 (8th Cir. 1999). Because the SDWA is not self-implementing, Plaintiffs' "as-

applied" challenge necessarily implicates the EPA regulations or other final agency action. Plaintiffs cannot challenge only the constitutionality of the statutory scheme. *See Missouri v. United States*, 109 F.3d 440, 441-42 (8th Cir. 1997); *Virginia v. United States*, 74 F.3d 517 (4th Cir. 1996).

IT IS ORDERED that Defendants' motion to dismiss (filing 15) is granted and Plaintiffs' complaint is dismissed for lack of subject matter jurisdiction.

DATED this 4th day of April, 2000.

BY THE COURT,

/s/ Richard G. Kopf
Richard G. Kopf
Chief United States District Judge

(2)

Supreme Court, U.S.
FILED
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No. 00-1628

IN THE SUPREME COURT OF THE UNITED STATES

JEAN TRIGALET and MYRA TRIGALET,
As personal representatives of the estates of CONSTANCE TRIGALET and MARTHA ANNETTE TRIGALET, and LEONARD MUNSON, as personal representative of the estate of STEVEN LEWIS MUNSON
Petitioners,

v.

CITY OF TULSA, OKLAHOMA, a municipal corporation
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a municipality can be directly liable for violating a citizen's substantive due process rights when the individual officer's conduct did not rise to the level of a substantive due process violation.

II. Whether a municipality may be directly liable for violating a citizen's constitutional rights when the policies, practices, and customs of the municipality were arbitrary, conscience shocking and a proximate cause of the deaths of the petitioner's decedents.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Respondent respectfully requests this Honorable Court deny the writ for certiorari, sought by the Petitioners, seeking review of the decision of the Tenth Circuit Court of Appeals granting judgment to the City of Tulsa.

OPINIONS BELOW

The opinions and orders previously entered in this action are appropriately set out in the Appendix to the Petitioners' petition.

THE PETITION FOR WRIT SHOULD BE DENIED

The purpose of the extraordinary remedy of certiorari is to offer a limited review of a cause that has been decided by the highest court of last resort before presentation to this Court. Certiorari should only be granted when the case clearly presents a situation indicative of unfair justice and that redress cannot be obtained through ordinary proceedings.

This Court has recognized the limited jurisdiction available by way of certiorari. Only fundamental questions of widespread importance should be considered:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion of authority between the circuit courts of appeal.

Layne v. Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, (1923).

The rules of this Court also define the narrow limits of such review. "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10. These rules set forth the circumstances that must exist for a writ of certiorari to be granted.

In the present case, review is sought on the ground that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important issue." Supreme Court Rule 10 (a). While Petitioners suggest that the case merits review to resolve a conflict among the court of appeals, the conflict identified by the Petitioners is illusory. However, a review of the authorities reveals the decision of the Tenth Circuit is in accord with the decisions of this Court and other circuit court of appeals.

I

A MUNICIPALITY CANNOT BE HELD LIABLE FOR VIOLATING A PERSON'S SUBSTANTIVE DUE PROCESS RIGHTS WHEN THE OFFICERS WHOSE CONDUCT DIRECTLY CAUSED THE PERSON'S INJURIES DID NOT VIOLATE THE PERSON'S SUBSTANTIVE DUE PROCESS RIGHTS.

Petitioners assert there is a difference between this Court's holding in *City of Canton v. Harris*, 489 U.S. 378 (1989) and *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) regarding whether a municipality can be held liable when an officer whose conduct caused a person's injuries is

found not to have violated the person's constitutional rights. Extant jurisprudence does not support this position.

In *Heller*, issues pertaining to an individual police officer's individual civil rights misconduct were bifurcated for purposes of trial from a concurrent claim that the City of Los Angeles was responsible for the officer's misconduct as a result of its police regulations. A jury was impaneled to determine the officer's liability. The jury determined that the officer had not violated the plaintiff's constitutional rights. Upon that finding, the trial court dismissed the concurrent claim against the City of Los Angeles, concluding that there could be no basis for the City's liability if the individual officer had not violated the plaintiff's constitutional rights. Reversal of this judgment by the Ninth Circuit in *Heller v. Bushey*, 759 F.2d 1371 (9th Cir. 1985) prompted a fairly blunt reinstatement of the trial court's decision by this Court:

> [T]his was an action for damages, and neither *Monell v. New York City Department of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), nor any other of our cases authorize the award of damages against a municipal corporation based upon the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point. *Heller*, 475 U.S. at 499.

In *Canton*, the Court recognized that inadequate training, in and of itself, is not sufficient to impose municipal liability. The Court did embrace the notion that if a concededly valid policy is unconstitutionally applied by a municipal employee, the City is liable if the employee has not been adequately trained and the constitutional wrong has

been caused by that failure to train. Applying this principle, the Court stated at page 391:

> [F]or liability to attach in this circumstance the individual deficiency in a city's training must be closely related to the ultimate injury. Thus, in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs.

In *Collins v. City of Harker Heights*, 503 U.S. 115, (1992) the Court reiterated that an underlying constitutional violation must exist to impose liability on a municipality. Therein, the Court's stated, at page 124,

> "We concluded that if a city employee violates another's constitutional rights, the city may be liable if it had a policy or custom of failing to train its employees and that failure to train caused the constitutional violations."

The Court went on to distinguish its use of the term "deliberate indifference" in Eighth Amendment cases. The Court continued, "that term was used in the *Canton* case for the quite different purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents."

The cases are consistent in holding a municipality cannot be held liable when the officers whose conduct directly caused a person's injury did not violate the person's substantive due process rights.

II

THE CIRCUIT COURTS HAVE BEEN CONSISTENT IN THEIR APPLICATION OF THE *HELLER* DOCTRINE THAT MUNICIPAL LIABILITY ONLY EXISTS WHEN THERE HAS BEEN AN UNDERLYING CONSTITUTIONAL VIOLATION.

Petitioners assert there is a wide ranging conflict between the circuits regarding the direct liability of a municipality when a third party is injured but does not suffer a constitutional deprivation. Case law does not support this position.

Every court of appeals decision except *Fagan v. City of Vineland*, 22 F.3rd 1283 (3rd Cir. 1994) (panel opinion) is in accord with *Heller*. See: *Hayden v. Grayson*, 134 F.3d 449 (1st Cir. 1998); *Thomas v. Roach*, 165 F.3d 137 (2nd Cir. 1999); *Mark v. Borough of Hatboro*, 51 F.3d 1137 (3rd Cir. 1995); *S.P. v. City of Takoma Park, Md.*, 134 F.3d 260 (4th Cir. 1998); *Leatherman v. Tarrant County*, 28 F.3d 1388 (5th Cir. 1994); *Smith v. Thornberg*, 136 F.3d 1070 (6th Cir. 1998); *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994); *Tesch v. County of Green Lake*, 157 F.3d 465 (7th Cir. 1997); *Robinson v. City of St. Charles, Mo.*, 972 F.2d 974, 977 (8th Cir. 1992); *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir. 1996); *Myers v. Oklahoma County Bd. Of Com'rs*, 151 F.3d 1313 (10th Cir. 1998); *Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996).

Petitioners claim "many courts have determined that *Heller* does not preclude consideration of municipal liability even when the individual officers have been exonerated." (Petitioners Brief at page 10). However, none of the cases cited by the Petitioners support this statement. Of seven cases, Petitioners cited only one case, *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990), that was decided

after this Court's decision in *Heller*. However, the Tenth Circuit addressed neither *Heller* nor the individual liability issue in *Berry*.

Petitioners contend the Tenth Circuit's reliance on *Heller* was incorrect. The Petitioners reason that *Heller* was a Fourth Amendment case while the present case is brought pursuant to the Fourteenth Amendment. They distinguish the present case because the Tenth Circuit applied the "shocks the conscience" standard to determine the individual officers had not violated petitioners' constitutional rights. Such a differentiation misses the point of *Heller* that whenever an injury is solely attributable to the actions of an officer, a municipality cannot be held liable if it is determined the officer did not commit a constitutional violation.

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) this Court distinguished the custodial situation of a prison from that of a police pursuit. In a custodial situation the government deprives an individual of his liberty. In doing so, the government also deprives that person of his ability to care for himself. In those situations, it is possible that the harm that would befall an inmate was not the result of the actions of individual officers. Rather, the harm could result from the decisionmaker's choice. That choice could include lack of sufficient staff to protect the inmates or to have insufficient medical personnel on duty. In those cases it is the conscious choice of the decisionmaker, not the actions of individual officers that caused the harm. Thus, *Heller* would not be applicable.

In a pursuit situation, as in this case, the alleged injury arises from the decision made by individual officer to pursue a particular suspect. Since the injuries would be attributable solely to the decision of the individual officer to pursue, *Heller* would apply. *Barrett v. Orange County Human*

Rights Commission, 194 F.3d 341 (2nd Cir. 1999) is illustrative of this point.

In *Barrett*, the Second Circuit found that liability of the Commission was not inconsistent with a finding the individuals had committed no wrong. The Court noted the Commission was a multi-member board that makes its decisions as a group. The act of termination was an action of the group, not the named individuals. Thus, it was the Commission as a group that terminated Barrett, not the individual members of the Commission. Since the decision to terminate Barrett was not attributable solely to the individuals, *Heller* was not applicable to the situation.

Petitioners place great weight upon *Fagan v. City of Vineland*, 22 F.3rd 1283 (3rd Cir. 1994). The *Fagan* panel, in a two to one decision, departed from established precedent. That panel stated:

> We decline to follow four other courts of appeals, which have suggested that a municipality can be liable for failure to train only if one of the pursuing police officers violated the Constitution. See *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 724 (4th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992); *Roach v. City of Fredericktown, Mo.*, 882 F.2d 294, 297-98 (8th Cir.1989); see also *Medina v. City and County of Denver*, 960 F.2d 1493, 1499-500 (10th Cir. 1992) (city can be liable if pursuing officers violate Constitution but escape liability because of qualified immunity); *Garner v. Memphis Police Dept.*, 8 F.3d 358, 364-65 (6th Cir.1993) (same), cert. denied, --- U.S. ----, 114 S.Ct. 1219, 127 L.Ed.2d 565 (1994).

The *Fagan* opinion has been widely criticized and rejected by other circuits.

In *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994), the Court held that to prevail on a *Monell* claim, the plaintiff had to establish an underlying constitutional violation. The Court acknowledged the *Fagan* decision stating:

> *Fagan* attempts to distinguish *Heller* on the grounds that in *Heller*, the plaintiff was only seeking to hold the City of Los Angeles liable under a theory of respondeat superior. That cannot be the case since *Monell* expressly holds that there is no cause of action for respondeat superior liability against a municipal corporation under 42 U.S.C. Sec. 1983. *Monell*, 436 U.S. at 694-95, 98 S.Ct. at 2037-38. Thus we choose to follow the clear holding of Heller that "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." *Heller*, 475 U.S. at 799, 106 S.Ct. at 1573. *Thompson*, 33 F.3d at 860, n. 11.

In *Evans v. Avery*, 100 F.3d 1033, (1st Cir. 1996) the Court stated at page 1039-1040:

> In *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir. 1994) (panel opinion), the court stated that "in a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the

> Constitution." *Id.* at 1292. The court reasoned that the claim against the officers and the claim against the municipality were based on two different theories: the officers would be liable if their conduct "shocked the conscience," while the city would be liable if its policy makers, acting with deliberate indifference, implemented a policy that encouraged the officers to conduct an unsafe pursuit. *Id.* *Evan* invites us to adopt this analysis. We decline the invitation because we believe that the *Fagan* panel improperly applied the Supreme Court's teachings. . .
>
> The *Fagan* panel described the "deliberate indifference" test as a "different theor[y]" for municipal liability, 22 F.3d at 1292, but the "deliberate indifference" test is not an independent theory at all. Rather, deliberate indifference is merely an articulation of the second prong of the *Collins* framework, adapted to "policy and custom" cases. In treating it as a separate theory, the *Fagan* panel ignored the first segment of the framework: the requirement that the plaintiff's harm be caused by a constitutional violation. (citations omitted) Consequently, we follow *Heller's* clear rule and hold that the City cannot be held liable absent a constitutional violation by its officers. *Evans,* 100 F.3d at 1039-1040.

Another Third Circuit opinion has also criticized the rationale of the *Fagan* opinion. In *Mark v. Borough of Hatboro*, 51 F.3d 1137 (3rd Cir. 1995) the appeals court said:

> [T]he *Fagan* panel opinion appeared to hold that a plaintiff can establish a constitutional violation predicate to a claim of municipal liability simply by demonstrating that the policy makers, acting with deliberate indifference, enacted an inadequate policy that caused an injury. It appears that, by focusing almost exclusively on the "deliberate indifference" prong of the *Collins* test, the panel opinion did not apply the first prong--establishing an underlying constitutional violation. *Mark*, 51 F. 3d at 1153, n. 13.

Petitioners set forth several cases they claim reach the same result as *Fagan*. However, those cases are distinguishable on their facts or have been misinterpreted by the Plaintiffs.

For instance, Plaintiffs rely heavily upon the case of *Chew v. Gates*, 27 F.3rd 1432 (9th Cir. 1994). In *Chew*, the individual officers caused a constitutional violation. In the present case it has been determined that the individual officers did not violate the constitutional rights of the Petitioners.

In *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir. 1996), the plaintiff cited *Chew* for the proposition that a municipality could be held liable under §1983 notwithstanding a finding the individual defendants were found not to have committed a constitutional violation. The Ninth Circuit rejected such an interpretation of those decisions. The *Quintanilla* Court found *Heller* dispositive and plaintiff had to show the individual officers violated his constitutional rights before the municipality could be held liable.

Plaintiffs also cite *Parrish v. Luckie*, 963 F.2d 201, 207 (8th Cir. 1992). Citing *Heller*, the *Parrish* Court reiterated that municipal liability could not be imposed upon a finding that plaintiff's constitutional rights were not violated. *Parrish*, 963 F.2d at 207. The jury was required to answer special interrogatories. It made a finding the individual officer had violated the plaintiff's constitutional rights. In light of the jury's finding, the Court held municipal liability was not inconsistent. *Parrish*, 963 F.2d at 207.

The Eighth Circuit later examined *Parrish* in *Robinson v. City of St. Charles, Mo.*, 972 F.2d 974, 977 (8th Cir. 1992). Finding the individual officers had not caused a constitutional violation, the *Robinson* Court found the municipality could not be held liable under §1983. The Court went on to say that, "Our recent decision in *Parrish v. Luckie* (citation omitted) is distinguishable because there the jury found that an officer had deprived plaintiff of her constitutional rights." *Robinson*, 972 F.2d at 977, n 3.

In support of their position, Petitioners claim the Eighth Circuit upheld a "verdict exonerating individual defendants but finding municipality liable" in *Praprotnik v. City of St. Louis*, 798 F.2d 1168 (8th Cir. 1986) (Pet. Br. at 17). The Court in *Praprotnik*, at page 1173, footnote 3, actually stated:

> *Heller* is, however, distinguishable from the present case. Crucial to the result in *Heller* was the fact that the city's liability, if any, was solely derivative of the conduct of the named individual defendant. *Id.* **Here, persons other than the named defendants, namely, Thomas Nash and Robert Killen, effected city policy in laying Praprotnik off and thereby brought to fruition Praprotnik's ultimate injury.** The failure of the jury to

> find the individual named defendants responsible for Praprotnik's damages can be justified by the fact that the named defendants were not the supervisors directly causing the lay off, when the actual damages arose. *Praprotnik*, 798 F.2d 1773, n. 3 (emphasis added).

The Petitioners next cite *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990). In *Gibson*, the appeals court reversed and remanded a decision in favor of the City because the plaintiffs did not have an opportunity to conduct discovery. The decision was based on the standards of Rule 12(b)(6). Later, in *Tesch v. County of Green Lake*, 157 F.3d 465 (7th Cir. 1997), the same court, citing *Gibson*, held that finding the individuals had not violated the plaintiff's constitutional rights precluded a finding of liability on the part of the government. The appeals court stated:

> A failure to train theory or a failure to institute a municipal policy theory requires a finding that the individual officers are liable on the underlying substantive claim. *Tesch*, 157 F.3d at 477 (citing *Gibson v. City of Chicago*, 910 F.2d 1510, 1522 (7th Cir. 1990).

The only other case cited by Petitioners that addresses the same issue is *Hewitt v. City of Stanton*, 798 F.2d 1230 (9th Cir. 1986). The Petitioners quoted from page 1233 of *Hewitt*, "The City could . . . be liable under *Monell*. . . even if [the individual officer] was exonerated, as long as [the officer] had in fact acted pursuant to municipal policy or regulation." In so holding, the Ninth Circuit relied upon its decision in *Heller v. Bushey*, 759 F.2d 1371 (9th Cir. 1985). The viability of the *Bushey* opinion is doubtful in light of the fact the Supreme Court granted certiorari and vacated that

judgment in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986).

Petitioner has relied heavily on Eighth Amendment cases in their argument. In such cases the Constitution guarantees certain minimal custodial standards for persons who the government has deprived of their liberty. Such cases are distinguishable from the present case. The courts have been consistent in their application of *Heller* to cases involving allegations of injury directly attributable to the actions of individual officers.

III.

PETITIONERS' ARGUMENT THAT THE CITY IS DIRECTLY LIABLE PURSUANT TO *COLLINS* FOR INDEPENDENTLY VIOLATING THE SUBSTANTIVE DUE PROCESS RIGHTS OF THE PETITIONERS' DECEDENTS IGNORES THE FIRST PRONG OF THE COLLINS TEST.

Petitioners rely upon *Collins v. City of Harker Heights*, 503 U.S. 115, 124 (1992) in support of their second question. The Petitioners state, "if the city's conduct could have been characterized as arbitrary in a constitutional sense or conscience shocking, the plaintiff would have stated a claim of direct municipal liability." (Petitioners' Brief at page 26). This argument is similar to the oft-criticized analysis of *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir. 1994). This analysis ignores the first prong of the *Collins* test – establishing an underlying constitutional violation. *Mark v. Borough of Hatboro*, 51 F.3d at 1153, n. 13.

Petitioners' argument ignores the Court's discussion of *Canton*. *Collins*, 503 U.S. at 123-124. There the Court stated that in *Canton*, "we concluded that if a city employee violates another's constitutional rights, the city may be liable

if it had a policy or custom of failing to train its employees and that failure to train caused the constitutional violation." Petitioners' argument thus ignores the first prong of the *Collins* test- that the injury be caused by a constitutional violation. See *Evans v. Avery*, 100 F.3d 1033, 1040 (1st Cir. 1996).

Lastly, despite Petitioners' statements to the contrary at page 27 of their petition, at no time has there been a finding that "the policies, practices and customs of Tulsa were arbitrary, conscience shocking and a proximate cause of the deaths of the Petitioners' decedents." In fact, the District Court noted there were disputed issues of fact as to the issue. See Petitioner For Writ of Certiorari, App. C at 38a-39a.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: June 5, 2001.

Respectfully submitted,

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